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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Defendant.

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Docket No. NOR 42178

**NAVAJO TRANSITIONAL ENERGY COMPANY, LLC'S REBUTTAL IN
SUPPORT OF *EX PARTE* APPLICATION FOR
SECTION 11123 EMERGENCY SERVICE ORDER**

NAVAJO TRANSITIONAL ENERGY
COMPANY, LLC

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SUMMARY

BNSF Railway Company's ("BNSF") Reply to Navajo Transitional Energy Company, LLC's ("NTEC") Application for a Section 11123 Emergency Service Order fails to support BNSF's rewriting of its common carrier obligation and instead fundamentally underscores why the Board should grant NTEC's Application and issue an emergency service order.

BNSF's Reply reveals its belief that, as the *railroad*: BNSF alone knows what constitutes an emergency for its customer; BNSF alone will determine when, where and how it will carry out its common carrier obligation or any other obligations; BNSF alone will peer into the ledgers and accounts of its customers and decide what sales and lines of business are critical to the ongoing viability of that customer; BNSF alone will decide which customers it deems worthy of its service; and BNSF alone will decide whether or not there are any consequences to drastically reducing its ability to serve its customers. As the ICC recognized 100+ years ago, if the railroads make all such decisions without check "[t]his is not regulation of railroads by the nation, but regulation of the industries and commerce of the country by its railroads."¹ The Board should not countenance BNSF's effort to shield its actions from STB scrutiny.

BNSF's significant omissions similarly underscore why the Board should grant NTEC's Application. BNSF fails to respond to NTEC's demonstration that BNSF

¹ *In re: Investigation of Advances in Rates by Carriers in W. Truck Line, Trans-Miss. & Ill. Freight Comm. Territories*, 20 I.C.C. 307, 350-351 (1911) ("*Western Truck Line*").

intends to significantly reduce NTEC's service in June to only 16 trains, a reduction of over 40%. BNSF fails even to attempt to defend its own tariff language claiming "sole discretion" to determine its service levels. BNSF fails to dispute NTEC's observation that BNSF never objected to NTEC's common carrier service request as unreasonable. And BNSF fails to address the question of whether any contractual commitments it has made – or that it intends to make – will deprive BNSF of its ability to respond to NTEC's reasonable request for common carrier service,² especially where BNSF has threatened to further degrade NTEC's service by signing up still more "potential" export coal customers. Reply at 23; *see also* Application at 7-8.

Thus, pursuant to 49 C.F.R. 1146.1(b)(3), NTEC hereby submits this Rebuttal in support of its Application for a Section 11123 Emergency Service Order.

ARGUMENT

A. BNSF's Claim of Unilateral Authority

BNSF premises its Reply on the flawed claim that BNSF alone should decide which shippers are entitled to receive service and that any Board interference with BNSF's discretion is harmful. The Board must not permit BNSF to operate in a vacuum where it has unilateral discretion to determine the needs and economic tolerances of its customers. For example, BNSF boldly suggests – with no facts or details from NTEC itself – that "NTEC is primarily a supplier of domestic coal in the U.S. market" and that "[i]ts financial viability is not dependent on export coal sales." Reply at 21. The ICC

² 49 U.S.C. § 11101(a).

rejected such railroad hubris long-ago in *Western Truck Line* holding that the setting of rates on the:

ability of the shipper to pay alone necessarily gives to the carrier the right to measure the amount of profit which the shipper may make and fix its rate upon the traffic manager's judgment as to what profit he will be permitted. This theory entitles the railroad to enter the books of every enterprise which it serves and raise or lower rates without respect to its own earnings but solely with respect to the earnings of those whose traffic it carries. This is not regulation of railroads by the nation, but regulation of the industries and commerce of the country by its railroads.

Id., 20 I.C.C. at 350-351.

**B. BNSF Silence on its “Sole Discretion” Tariff Provision
and BNSF’s Narrow Interpretation of 49 U.S.C. § 11123**

BNSF makes no reference to NTEC’s objection to the terms of BNSF’s Common Carrier Rate Authority purporting to give BNSF “sole discretion” to decide whether to provide service to NTEC. *See* Application at 2; *see also id.* at 8 (identifying the “sole discretion” language in BNSF’s 90139 Common Carrier Rate Authority and objecting to this claim of discretion). As NTEC explained, “BNSF cannot avoid its common carrier obligation to NTEC by granting itself the ‘sole discretion’ to decide whether, and the extent to which, it is really bound by that obligation.” *Id.* at 16. Notwithstanding NTEC’s arguments on this critical element of the Common Carrier Rate Authority at issue, BNSF’s Reply is silent.

Instead, BNSF devotes much of its Reply to claiming that emergency relief should be available only in very limited circumstances. Reply at 15-18. There is no language in 49 U.S.C. § 11123 limiting emergency relief to life-or-death and/or public health situations as BNSF suggests. Indeed, no such circumstances existed in the *Canexus*

case.³ If BNSF were correct that Section 11123 relief is available only in extreme situations, then Congress would have limited Section 11123 accordingly. The actual language of Section 11123 allows the Board to order emergency relief where transportation failures have “substantial adverse effects on shippers.” BNSF’s decision to cut NTEC’s monthly service in June 2023 (*i.e.*, peak sales season) by over 40% relative to April and May 2023 levels currently is having – and will continue to have – a “substantial adverse effect” on NTEC. Similarly, BNSF does not dispute that the United States has a Treaty obligation to the Navajo Nation, NTEC’s sole shareholder.

C. BNSF Fails to Respond to Key NTEC Factual Assertions

BNSF fails to mention – let alone dispute – key factual assertions in NTEC’s Application. The Board should deem BNSF to have conceded each of these points:

(1) NTEC demonstrated in its Application that BNSF intends to reduce NTEC’s monthly export-train counts from their April and May level (*i.e.*, currently forecast to be 27 trains per month) down to only 16 trains in the month of June (59% of the anticipated service in April and May). *See* Application at 6, 8, 16, 21, Verified Statement of Matthew D. Babcock at ¶ 2, ¶ 18, ¶ 28 (each discussing BNSF’s intention to sharply reduce shipping volumes for NTEC in June). BNSF never mentions its intended June service reduction in its Reply.

Instead, BNSF makes eight separate claims that NTEC is seeking “extra service.”

³ *Canexus Chemicals Canada L.P. v. BNSF Ry. – Emergency Service Order*, FD 35524 (STB served Oct. 14, 2011) (granting emergency service order under 49 U.S.C. § 11123 regarding the movement of chlorine).

See, e.g., Reply at 3 (“NTEC’s claim is not about failure of service, but instead about getting extra service allocated in a constrained market.”); *see also id.* at 2, 5, 12, 15. A shipper’s emergency request to be spared from a more-than 40% month-over-month reduction in train movements does not constitute a demand for “extra service.”

(2) NTEC demonstrated in its Application that, as between the first eight months of 2021 and the first eight months of 2022, BNSF increased its overall number of export coal trains moving to Westshore but substantially cut NTEC’s service. *See* Babcock V.S. at ¶ 24. BNSF never mentions (or attempts to dispute) this practice of favoring NTEC’s competitors in the Reply. ***Instead***, BNSF claims that 2021 service was an anomaly and that BNSF could not possibly continue to provide service at that level. *See* Reply at 20. Mr. Babcock’s explanation of BNSF’s 2022 service improvements for non-NTEC shippers demonstrates the fallacy of BNSF’s effort to characterize 2021 as an aberration.

D. BNSF’s Zero-Sum Fallacy

BNSF tries to create the illusion that railroad service is a “zero-sum” game in which the restoration of service to one shipper necessarily will harm other shippers. *See* Reply at 4, 22-23. BNSF ignores the real question in this emergency service action: whether the interests of railroad owners and shareholders invariably should prevail over the interests of the shipping public.

BNSF never suggests that it cannot provide NTEC’s reasonably requested common carrier service. And aside from various anecdotal claims, BNSF never

demonstrates that BNSF could not meet the reasonable needs of other similarly situated shippers. While meeting the reasonable needs of those shippers might require BNSF to incur some additional costs (at least in the near-term future), BNSF may not excuse itself from meeting its common carrier obligation simply as a means of maximizing its corporate profits or because it is not convenient. In its Reply, BNSF candidly admits – with a significant degree of understatement – that it “is not in dire financial straits.” Reply at 18. Relatedly, BNSF emphasizes in its Reply that the Board should not give priority to “concern[s] about a corporation wanting to increase its profits” *Id.* at 14.

Ultimately, BNSF suggests that emergency relief in NTEC’s favor would create a dangerous precedent (*id.* at 21-24), but the real danger is the harm to the shipping public when the continuing patterns of railroad service degradation and disregard for the common carrier obligation – that are direct consequences of railroad decisions to increase profitability for shareholders, regardless of the consequences to the shipping public – go unchecked.

E. BNSF’s Regular Communication Defense

Finally, BNSF seeks to preclude emergency-service relief by observing that it has been in consistent communication with NTEC, including recent weekly operational calls, and that BNSF is willing to engage informally with NTEC and the Office of Public Assistance. *See, e.g.*, Reply at 34, Verified Statement of Farah Lawler at 10; *see id.* (“BNSF routinely provides updated train estimates” to NTEC). BNSF’s actions and offers are hollow. Notifying a shipper that it will not receive adequate service does not

constitute compliance with the common carrier obligation nor will it protect NTEC from the harm associated with 40%+ cut in monthly service levels.

As NTEC explained in its Application, “BNSF and NTEC have communicated regularly throughout 2023 regarding NTEC’s common carrier service requirements, but BNSF has continued to refuse to provide adequate service.” Application at 8 (citing Babcock VS at ¶ 22). Neither additional bilateral communications nor additional time spent in communication with the Office of Public Assistance will motivate BNSF to spare NTEC from the anticipated June service cut. Only a Board order granting NTEC’s requested emergency relief will do so.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of April 2023, caused copies of the foregoing to be served via email on the following counsel for BNSF Railway Company:

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